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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

MELVIN TYLER,

Petitioner

v.

BURL CAIN, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent Burl Cain, Warden Louisiana State Penitentiary, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. The opinion is unreported and is attached to respondent's brief as Appendix A. Petitioner adequately states the case and facts.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The issue of whether 28 U.S.C. §2244(b)(2)(A)'s requirement that retroactive application of new rules be made by the Supreme Court itself for successive petitions impermissibly constrains the federal judiciary was not presented to the court below.

Petitioner contends that §2244(b)(2)(A) as interpreted by the Fifth Circuit stands *Marbury v. Madison*, 5 U.S. 137 (1803) on its head. Clearly, the issue of whether the statute violates the separation of powers presents a substantial federal question. However, petitioner did not raise this issue on appeal, nor was it addressed by court below. Because petitioner did not challenge the constitutionality of the statute, the question of whether and to what extent 2244(b)(2)(A) restricts the power of Article III courts and restricts the impact of this Court's jurisprudence was not addressed by the Fifth Circuit. Accordingly, the writ should be denied.

2. The decision below does not raise the Question Presented in the petition regarding the retroactivity of Cage.

Petitioner asks this Court to address the question of whether *Cage* should be applied retroactively, while the Fifth Circuit has addressed this issue in *Humphrey v. Cain*, 138 F.3d 552 (5th Cir.)(en banc), *cert. denied*, 525 U.S. 935 (1998), the only question actually presented by the opinion below is whether this Court has ever made *Cage* retroactive on collateral review. Whether *Cage* is a new rule and if so whether it fits under the second *Teague* exception of "watershed rules of criminal procedure" and rules which will "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. 288, 311 (1988), is simply not present in this case, and the Question Presented could only be resolved by rendering an impermissible advisory opinion.

As petitioner correctly states, the Louisiana Supreme Court has not interpreted *Cage* to rise to the level of a "watershed" rule of **criminal procedure** in the vain of *Gideon v. Wainwright*, 372 U.S. 335 (1963).[1] *See, State ex rel. Taylor v. Whitley*, 606 So.2d 1292 (La.1992) As such, a grant of certiorari from a state court decision so holding would be far more appropriate than in this mater where the issue was not addressed.

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[1] The court saw *Cage* as creating a substantive rule.

Furthermore, the constitutionality of the reasonable doubt jury instruction given at petitioner's trial was not addressed by the Fifth Circuit. Should this Court grant certiorari, the merits of petitioner's claim would not be at issue. While this Court has spoken on the proper standard, a case which presents an opportunity to further address the merits of such a claim would be a more appropriate vehicle to address this issue.

3. The Fifth Circuit did not address the reasoning of West v. Vaughn, and Williams v. Taylor may resolve the split.

Petitioner correctly notes there is a split amongst the circuits as to the proper interpretation of the phrase "made retroactive to cases on collateral review by the Supreme Court."[2] However, the case below was submitted before *West v. Vaughn*, 204 F.3d 53 (3rd Cir. 2000) was decided and the Fifth Circuit did not address the Third Circuit's contrary opinion. Accordingly, this court would not have the benefit of the Fifth Circuit's reasoning in this regard.

Additionally since *West v. Vaughn* was decided this Court delivered its opinion in *Williams v. Taylor*, 529 U.S. 362 (2000) which was the basis for criticizing *West* by the Seventh Circuit in *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000).[3] Accordingly, while a split in the Circuits exists,

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[2] Respondent does not agree that *Nevius v. Sumner*, 105 f.3d 453, 462 (9th Cir. 1996) concluded that this court made *Cage* retroactive in *Adams v. Evatt*, 511 U.S. 1001 (1994). The court held simply that the petitioner had made a *prima facie* showing that his application satisfied §2244(b)(2)(A) and did not "intimate any view " as to whether the petitioner had "in fact met the requirements" of the statute. Indeed, the Fifth Circuit in this case granted petitioner leave to file a successive petition, and nevertheless, concluded that §2244(b)(2)(A) precluded relief. In any case, *West v. Vaughn* still presents a split.

[3] "In *West* the third circuit confused a substantive question ('which decisions apply retroactively?') with a procedural question ('which court makes the retroactivity decision?'). *Cf. Williams v. Taylor*, 529 U.S.362, 120 S.Ct. 1495, 1523, 146 L.Ed 389 (2000)." *Talbott v. Indiana*, 226 F.3d at 868.

the impact of this court's opinion in *Williams v. Taylor* has had little to time to percolate amongst the lower courts. Indeed, the Third Circuit may reevaluate the basis for its holding in light of *Williams v. Taylor*, and for this reason the writ should be denied.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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